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DEVELOPMENT OF THE AMERICAN LAW OF CORPORATIONS TO 1832

*Douglas Arner**

THIS article began life almost ten years ago as an essay for Professor Joe M^cKnight's American Legal History course at SMU. Despite the topic not being one of his major interests, Prof. M^cKnight very generously provided guidance, sources from his collection of rare books, and comments on successive drafts, both while the author was a student and after. In addition to his own time and expertise, Prof. M^cKnight allowed the author far more time than he really deserved in which to complete the initial work. It is therefore very appropriate that this piece be included in a tribute to Prof. M^cKnight, as it clearly demonstrates the effect that he has had on the career and scholarship of those who have known him and studied under his direction. Further, it illustrates a significant aspect of legal history which the author has come to appreciate: the fact that it changes slowly!

Significantly, over the past ten years, the role of corporate or company law and its importance for economic development has come under increasing scrutiny, especially as previously centrally-planned economies move towards market-based systems and as countries have focused more on the role of law and legal and institutional infrastructure in supporting financial development and economic growth.¹ Private business corporations are a vital aspect of a market economy, and analysis of the law's role in their development aids others attempting to develop functioning corporations and financial markets. Despite the usefulness of comparative historical analysis for contemporary economic transition, little study has

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1. See, e.g., John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1 (2001); R. LA PORTA, F. LOPEZ-DE-SILANES, A. SHLEIFER & R. VISHNY, *INVESTOR PROTECTION AND CORPORATE VALUATION* (Nat'l Bureau of Econ. Research, Working Paper No. W7403, 1999); Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781 (2001); Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 J. LEGAL STUD. 459 (2001); and J. Norton & D. Arner, *Development of Capital Markets, Stock Exchanges and Securities Regulation in Transition Economies*, in *TRANSITIONAL ECONOMIES: BANKING, FINANCE, INSTITUTIONS*, ch. 4 (Yelena Kalyuzhnova & Michael Taylor, eds., St. Martin's Press 2001).

been devoted to early development of corporate law in the United States and the United Kingdom, despite the fact that the Anglo-American model of corporate structure and governance has become the paradigm to which other countries aspire. Much of early U.S. corporate law (which began as state law, and today remains state law, albeit with a very influential overlay of federal regulation of corporations issuing securities) is derived from English sources; however, formal recognition of the legal foundations of business corporations developed earlier in the U.S. than in England.² Moreover, the law governing the behavior of corporations issuing securities to the public has remained more developed to the present in the United States than in the United Kingdom. The combination of early recognition of the fundamental legal supports to business corporations and the development of separate and comprehensive regulation of those companies issuing securities to the public may underlie the earlier development of the Berle and Means corporation³ (characterized by dispersed ownership and separation of ownership and control) in the United States than in the United Kingdom or any other jurisdiction. The early development of the private business corporation in the United States is then a matter of some importance, especially as it diverges from the early British practice.

Specifically, this article addresses development of the fundamental legal attributes generally attributed to modern corporations,⁴ prior to the development of general incorporation statutes in the United States and specifically suggests that the essential components were established by 1832 and crystallized with the publication of the first treatise on the law respecting corporations in the United States.⁵

This article is divided into three principal sections in an effort to reflect the major stages of the development of private business corporation law in the United States. Section I discusses the early development of corporate law, with primary focus on the early development of the joint stock company in England before approximately 1800. Section II addresses the period of transition and development of the law of business corporations

2. See generally, RON HARRIS, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720-1844* (Cambridge 2000); SCOTT R. BOWMAN, *THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY* (PA St. Univ. Pres. 1996); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* (Univ. Press of VA 1970); L.C.B. GOWER, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369 (1956). Note that in the English practice private business corporations as known in the United States practice are called "companies," and are organized under specific company statutes governing their various aspects. See also C. A. COOKE, *CORPORATION, TRUST AND COMPANY: AN ESSAY IN LEGAL HISTORY, 127-190* (1950); ARMAND BUDINGTON DUBOIS, *THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT, 1720-1800* (Octagon Books 1938).

3. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (Macmillan Co. 1933).

4. See generally, GOWER, *supra* note 2, and COOKE, *supra* note 2, for a discussion of the modern attributes of the corporate form.

5. JOSEPH K. ANGELL AND SAMUEL AMES, *TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE* (reprint, N.Y. Arno Press 1972) (1832).

in the United States from 1776 to approximately 1832. Section III discusses the state of business corporation law in 1832 at the time of the publication of the first treatise on the law of private business corporations in the U.S.

I. THE LAW OF CORPORATIONS LAW PRIOR TO 1776

The exact origins of the corporate form are not precisely known; however, the form dates back at least to the time of the Roman Empire although its use for private business purposes is probably considerably more recent. Blackstone attributed the invention of private corporations to a Roman, Numa Pompilius. According to Blackstone, Pompilius created the fiction of artificial corporate bodies in an effort to subdivide factions of Sabines and Romans into separate entities to prevent continued civil strife; the idea apparently was that if the two groups could effectively govern and view themselves independently and separately, then perhaps they might cease to kill one another with such frequency.⁶ Angell and Ames, however, believed that the corporation traces back at least to the Greeks, who appear to have copied the corporate form from the laws of Solon, which apparently allowed licensing private corporations so long as obedient to the state.⁷ Further, with the exception of the concept of limited liability, Angell and Ames felt that corporations in the United States at the time of the publication of their treatise very closely resembled those of the Romans,⁸ and in fact the Romans used the essential division of corporations that Angell and Ames themselves used in 1832: ecclesiastical and lay, eleemosynary and civil.⁹

The practice of incorporating bodies of persons composing particular trades, including merchants embarking on commercial ventures, dates from the times of Solon and Numa Pompilius, and probably continued throughout the intervening time in England, although most early development seems to have stemmed from the needs of towns rather than from the needs of merchants.¹⁰ Angell and Ames, however, cited the creation of a company of Burgundian merchants called the "Merchant Adventurers" as early as 1248.¹¹ As the needs of the municipal corporation grew more complex, merchant guilds developed to control the right to

6. 4 WILLIAM BLACKSTONE, COMMENTARIES *471; *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

7. ANGELL & AMES, *supra* note 5, at 26-27.

8. "It has been considered that the corporations of our own time which more nearly resemble those of the Romans, are they which have been created in different parts of the United States by charters that impose upon each member a personal responsibility for the company debts, which, in that respect, resemble an ordinary copartnership." *Id.* at 28.

9. *Id.* at 29.

10. *Id.* at 30. According to Cooke, commercial corporate life in England began in the towns during the twelfth and thirteenth centuries as towns sought independence from feudal, ecclesiastical, and political control. Charters developed as towns sought the right to control their own political and economic development. COOKE, *supra* note 2.

11. ANGELL & AMES, *supra* note 5, at 31. Cooke, however, suggested that this incorporation of merchants was not actually incorporated as the "Company of Merchant Adventurers" until 1505. COOKE, *supra* note 2, at 34.

trade free of tolls within the municipality, though at least through the twelfth and thirteenth centuries, these guilds did not assume any direct trading function.¹² Guilds were governed through a council somewhat akin to a board of directors, and while at this time the guilds were not pursuing joint ventures, they did act to achieve a common purpose: control of trade within their jurisdiction.¹³ Following the rise of these general monopoly guilds, guilds began to subdivide into crafts guilds, each reflecting a specific trade within a given town, signaling further differentiation of the purposes of early English corporations.¹⁴ As early as 1437, these guilds and their ordinances had to be registered with and approved by the town wherein they were established.¹⁵ By the fifteenth and sixteenth centuries, the crafts guild and the borough were distinct in function with the borough or municipal corporation acting as an organ of government while the crafts guild was an economic asset for the benefit of its members, although legally the two were almost identical.¹⁶ According to Cooke, by the sixteenth century, the country as a whole was an economic unit for political purposes, with corporate forms existing as subordinate institutions serving national purposes, and with the central government reaching out to control both the municipalities and the guilds through statutes and new charters establishing the control of the central authority.¹⁷

Angell and Ames suggested the early division of these economic companies was into two classes: (1) regulated companies and (2) joint stock companies.¹⁸ Regulated companies were essentially state chartered monopolies for the pursuit of some interest beneficial to the state (such as foreign trade), and they have apparently existed in London and parts of Europe since at least 1566.¹⁹ Joint stock companies, as described, more closely resembled the modern form of business corporation, in that they are "composed of persons who seldom know any thing of the business of the company, but who leave the management of it entirely to a body of directors, and are contented with receiving such dividends as the directors

12. COOKE, *supra* note 2, at 22-23. This is probably the origin of the early association of incorporation with monopoly powers.

13. *Id.* at 24.

14. *Id.* at 26-27. These guilds evolved to reflect the needs of towns to develop through trade and commerce, but were still based on the monopoly form.

15. 15 H. VI, c. 6 (1437); 19 H. VII, c. 7 (1504), "De Privatis & Illicitis Statutis non Faciendis." These early statutes were an attempt to ensure that all actions of such corporations were in accord with the general law, thus indicating that even though such corporations were free to govern their own actions within their jurisdiction, their rights did not exceed or infringe upon those generally available. See COOKE, *supra* note 2, at 30-31.

16. *Id.* at 31.

17. *Id.* at 33-35. These were voluntary bodies with the right to plead and be impleaded, hold property, and have a common seal, and because of the existence of these early corporate attributes can be seen as the ancestors of the joint stock company. *Id.*

18. Angell and Ames may have taken this division from Adam Smith who used the same general divisions in his own classifications. See *infra*, sections II & III.

19. ANGELL & AMES, *supra* note 5, at 32.

think proper to make.”²⁰

Joint stock companies appear to have been the result of the gradual development of a class of wealthy merchants and property owners over time. These individuals combined their resources to undertake some venture beyond their individual means and tolerance for risk, and signaled the development of a new form of corporate venture clearly different from the early towns and guilds.²¹ Overall, this development reflected the general expansion of markets and an increasing use of capital as the basis of business, rather than merely the skills of craftsmen as predominated during the fourteenth through sixteenth centuries. These wealthy merchants were important in the development of the idea of capital and its uses in that, unlike the older classes whose wealth was based on property, their wealth was based on accumulation of gold and other forms of treasure approximating money at the time.²² Cooke suggested that the growth of the joint stock company was not so much the result of a few wealthy merchants and property owners investing excess rents, but rather was based on a large number of smaller successful tradesmen who had certain excess wealth, but neither the time nor the money for business on a large scale.²³ If this was in fact the case, it may explain the rapid development of the corporate form in the United States two hundred years later, with its large number of independent businessmen and property owners who did not yet possess significant accumulations of excess wealth.

During the second half of the sixteenth and the seventeenth centuries, the needs of trade and the existence of this pool of capital came together with the corporate form to emerge as the joint stock company. The firm as such came to be seen as a separate accounting entity from its underlying investors, predicated upon the development of the system of double entry accounting.²⁴ Major trading corporations developed over a period of approximately two hundred years and reflected an overall shift from medieval commerce to the modern form of shares in ongoing enterprises and free transferability through the mechanism of the stock market.

20. *Id.* at 32. The authors date banks of this form to Europe as early as 1401 with the establishment of a Table of Exchange in Barcelona.

21. See COOKE, *supra* note 2, at 36-37.

22. *Id.* at 39-41. Cooke suggests that liquidity of such investments was necessary to the evolution of the joint stock form in England; however, others have suggested that such transferability was in fact not a characteristic of the American form until the late nineteenth century. See Alfred F. Conard, *Cook and the Corporate Shareholder: A Belated Review of William W. Cook's Publications on Corporations*, 93 MICH. L. REV. 1724, 1730-31 (1995).

23. In fact, it was not clear until the sixteenth century that a business could have a capital value at all. A necessary development at this time then was the limitation of usury laws, allowing businesses to borrow funds to finance operations. Until this was allowed, loans were impossible due to general prohibitions on interest and the impossibility of valuing the business against which they were being taken. COOKE, *supra* note 2, at 42-43.

24. *Id.* at 47-48. Merchant adventures required large amounts of capital and entailed equally large risks of loss, as well as the need to wait sometimes years for any commercial success. Double entry accounting made this possible and seems to have developed around 1608. *Id.*

Charters were also granted as a means of furthering sovereign goals of increasing trade, but without the government being responsible for the risks thereof or for the outlay of large amounts of capital.²⁵ At this time, charters were seen to be granted in exchange for the public benefits associated with the possibility of large combinations of capital in areas of government interest.²⁶ As these ventures developed from the needs of a single voyage, to that of combinations for numerous voyages, to permanent enterprises represented by company assets governed by a select group of shareholders, the joint stock company of the eighteenth century began to appear.²⁷

A. DEVELOPMENT OF ENGLISH LAW: CORPORATE ATTRIBUTES

1. *Coke and the Case of Sutton's Hospital*

The *Case of Sutton's Hospital* in 1612 is generally regarded as one of the most important early cases on corporations.²⁸ While the case deals with a private incorporated charity (a hospital), it lays down the attributes that defined the corporate form, including that of the private busi-

25. Major companies incorporated during this period included the Merchant Adventurers (later known as the Hamburg Company), the East India Company, the Eastland Company, the Russia Company, the Levant Company, the Africa Company, the Hudson's Bay Company, the French Company, the Spanish Company, and the South Sea Company. *Id.* While free transferability of shares was already an important facet of the joint stock company in England at this time, shares in corporations in the United States were apparently not fully transferable until the twentieth century. See WILLIAM W. COOK, A TREATISE ON THE LAW OF STOCK AND STOCKHOLDERS 417-18 (Baker Voorhis & Co. 1887) (shares emphatically nontransferable in the United States in 1887); Uniform Stock Transfer Act (1909) in C. Terry, *Uniform State Laws in the United States Fully Annotated* 339-54 (1920); ALI, National Conference of Commissioners on Uniform State Law for the Uniform Commercial Code (1957). See generally Francis T. Christy, *Responsibilities in the Transfer of Stock*, 53 MICH. L. REV. 701 (1955); Alfred F. Conard, *A New Deal for Fiduciaries' Stock Transfers*, 56 MICH. L. REV. 843 (1958). Given the stock market boom in the United States in the 1920s, however, stock was obviously transferable albeit with some risk, despite certain commentators' assertions to the contrary. See Alfred F. Conard, *Cook and the Corporate Shareholder: A Belated Review of William W. Cook's Publications on Corporations*, 93 MICH. L. REV. 1724, 1730-31 (1995).

26. COOKE, *supra* note 2, at 49. Note that this public benefit was seen as essential even to incorporation in the United States in 1832. See *infra*, part III.

27. *Id.* at 49-50. The Merchant Adventurers of Newcastle-on-Tyne used the word "joint-stock" in documents for the first time in 1554; however, the extension of the system into an opportunity for the general public first arose with the East India Company. In the 1617 voyage to the Indies, 1,500,000 pounds sterling was invested by nearly a thousand subscribers, including fifteen earls and dukes, eighty-two privy councillors, judges and knights, thirteen countesses and ladies of rank, eighteen widows and maiden ladies, twenty-six clergymen, three hundred and thirteen merchants, two hundred and fourteen tradesmen, and twenty-five merchant strangers. *Id.* at 57-58. See John Keay, *The Honourable Company: A History of the English East India Company* (HarperCollins 1993), esp. 25-29 & 99-101 (discussing evolution of the corporate structure of the English East India Company).

Williston suggests that by 1720 upwards of 200 joint stock companies had been formed; however, at this time most of these joint stock companies were not in fact incorporated. Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, part I (1888) (citing Anderson, *And. Hist. Com.*, vol. i at 291 *et seq.*, vol. ii at 296 (1st ed.)).

28. 5 Co. Rep. 23 (1526-1616), reprinted at 285 (1826).

ness corporation, at least up to the time of Angell and Ames in 1832. Essentially, the case arose out of a conflict over the question of the validity of a bequest to Sutton's hospital between the family members not benefiting from the devise of the estate and the beneficiary corporation. In *Sutton's Hospital*, the plaintiff family members argued that (1) there was in fact no incorporation; (2) if there was an incorporation, Sutton had acted outside his permissible authority; and (3) the bargain and sale in question were void due to either or both of these circumstances.²⁹ Despite the later importance attached to this case, Coke himself indicated that neither the decision nor the arguments were worthwhile.³⁰ At the end of the case, however, Coke stated three reasons why he reported the case: (1) for the confirmation of incorporations founded for works of piety and charity in times past; (2) for the better instruction of how incorporation should occur thereafter so that no exception might be taken from the rules laid down; and (3) for resolving certain opinions and questions which were moved at the bar and which might have disturbed the state of the law, thereby avoiding certain future disputes.³¹ As evidence of the success of Coke's intentions, this case has been used as the general model for all following corporate explications at least up to 1832.³²

Coke began his analysis with a principle, which later became very important to corporate law: "because this case chiefly depends upon the letters patent, . . . the best exposition of the King's charter is upon the consideration of the whole charter, to expound the charter by the charter itself. . . ."³³ In other words, the powers of the corporation and the interpretation thereof came primarily from the charter of the corporation itself. Accordingly, Coke went on to analyze the charter (as defined by the letters patent) at some length, finding it in fact to be a valid charter granted by the King.³⁴

Of central importance in the opinion, Coke listed what he believed to be the essence of a corporation.³⁵ To that end, Coke listed five factors: (1) lawful authority of incorporation; (2) persons to be incorporated; (3) a name by which they are incorporated; (4) a place of incorporation; and (5) by means of words sufficient in law to indicate the intent to create a corporation.³⁶ According to Coke, there were only four ways by which a corporation could be created: (1) by common law, as by the King himself; (2) by the authority of Parliament; (3) by the King himself through a

29. *Id.* at 287.

30. "Which brief report I have made of these objections, because I think them, or the greater part of them, were not worthy to be moved at the bar, nor remembered at the bench . . ." *Id.* at 289. Others, however, who disagreed with Coke's analysis, thought that it was based at least partially on bias against the plaintiffs and their counsel.

31. *Id.* at 34b.

32. See, e.g., Sheppard, Blackstone, Kyd, and Angell and Ames, discussed *infra*.

33. 5 Co. Rep. at 34b. The "letters patent" were the device used by the King in the incorporation of Sutton's hospital.

34. *Id.* at 24b-28a.

35. *Id.* at 29b.

36. *Id.*

charter; and (4) by prescription.³⁷ The persons involved could be both natural or “bodies incorporate and political,”³⁸ indicating that at least as of 1612, corporations could be part of other corporations.

According to Coke, if a corporation was duly created, certain incidents automatically attached, without the need to detail them in the charter itself.³⁹ In analyzing the clauses of the charter itself, Coke listed several automatic incidents: (1) “the authority, ability, and capacity to purchase”; (2) to “sue and be sued, implead and be impleaded”; (3) to have and use a corporate seal; (4) “survivors will be the corporate,” i.e. perpetual succession; (5) to be visited by the governors, etc., i.e. that those giving the charter may in fact “visit” the corporation in order to determine that it is performing as intended; and (6) to make ordinances for its own governance and of those within its authority.⁴⁰ Coke described clauses detailing freedom from visitation by the ordinary, a license to purchase in mortmain, and the direction of future revenues as useful for the purposes intended for the corporation at issue, but neither necessary nor an automatic incident of every corporation.⁴¹ Finally, Coke stated that a clause restricting alienation and devise is “but a precept, and doth not bind in law.”⁴² In other words, statements within the charter do not override external law, so that while a corporation is responsible for its own internal governance, the existence of a corporate charter does not equate with complete freedom from the power of government.

Sutton's Hospital is often cited for the proposition that corporations cannot be charged for certain actions for which natural persons may be charged: “[F]or a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law. . . [corporations] cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney.”⁴³ The case is also often cited for the proposition that “none but the King alone can create or make a corporation. . .”⁴⁴ Elsewhere, as previously stated, Coke listed four manners in which a corporation may be created, and in fact the statement that corporations could only be created by charter should not be attributed to Coke in *Sutton's Hospital* because one of Coke's stated purposes in reporting the case was

37. *Id.*

38. *Id.*

39. *Id.* at 30b. Note that nowhere does Coke indicate that the charter cannot be withdrawn at the insistence of those giving it. Further, the automatic right of visitation may in fact suggest that the privilege of incorporation is in fact voidable if the corporation is not performing as intended.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 32b. Commentators have criticized this characterization as inaccurate and damaging to later legal development for centuries. See Amasa M. Eaton, *The First Book in English on the Law of Incorporation*, 12 YALE L.J. 259 (1903); Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, part 1 (1888).

44. 5 Co. Rep. at 33b.

to affirm the status of incorporation of earlier non-chartered charitable corporations.

2. *Sheppard and Of Corporations, Fraternities and Guilds*

The first English book on the law of corporations, that of William Sheppard, was published in London in 1659.⁴⁵ Sheppard is more famous for another volume, *The Touchstone of Common Assurances*, published in London in 1641, and rescued from oblivion by Lord Chief Justice Willes.⁴⁶ By profession, Sheppard was a country lawyer; however, he gained his knowledge of corporations from 1656-59 as one of four clerks appointed by the Lord Protector, Richard Cromwell, to draw up charters to municipal corporations.⁴⁷ After Cromwell's fall, Sheppard also fell into disfavor, and Eaton suggests that this may in fact be the reason that his book on corporations became so obscure.⁴⁸

Sheppard's book, entitled *Of Corporations, Fraternities, and Guilds*, treated municipal corporations principally but made no real distinction between the various other types of corporations.⁴⁹ Sheppard defined a corporation as "a body in fiction of Law, or, a body Politick that indureth in perpetual (succession)."⁵⁰ Sheppard went on to say:

A Corporation is a body politick, Authorized by the Lord Protector's Charter, to have a Common Seal, Head Officer, or officers and Members; all which together are able by their Common consent to grant, give, receive, or take any thing within the Compass of their Charter, or to sue, and be sued, as any one man may do, or be.⁵¹

Sheppard delineated corporations into the same types later used by both Blackstone and Angell, i.e., sole and aggregate, ecclesiastical and lay, eleemosynary and civil, that both Eaton and Williston, among others, later criticize as artificial.⁵² Following Coke, in *Sutton's Hospital*,⁵³ Sheppard stated that a corporation may be created through the same four methods described by Coke⁵⁴ and then described the essential require-

45. WILLIAM SHEPPARD, *OF CORPORATIONS, FRATERNITIES, AND GUILDS* (Garland Pub., Inc. 1978) (1659). See Eaton, *supra* note 43 (discussing Sheppard).

46. Eaton, *supra* note 43, at 260-61. In fact, there appears to be some confusion as to whether Sheppard actually wrote *Touchstone*. See *id.*

47. *Id.* at 259.

48. *Id.* at 259-62. In fact, Eaton suggests that there may in fact have been two editions. See *id.* at 260 n. 2 and accompanying text.

49. Eaton, *supra* note 45, at 263. Eaton suggests that this plainly indicates that "even so late as 1659 the distinctions between [various types of corporations] were imperfectly realized." *Id.*

50. SHEPPARD, *supra* note 45, at 1.

51. *Id.* at 4.

52. *Id.* at 2. See sources cited *supra* note 41.

53. See *supra* Part I, COKE, for discussion.

54. Eaton, *supra* note 45, at 272 (citing SHEPPARD, *supra* note 45 at 4-5). Eaton disagrees with Coke that corporations could only be created with the King's charter. To support his viewpoint, he cited the first general incorporation act, 39 Eliz. ch. 5 and 21 Jas. I ch. I, giving power to incorporate without the action of either King or Parliament. "Evidently so late as 1659, although the act had been in force 62 years, its effect was not realized by our writer." *Id.* at 275.

ments of incorporation exactly as Coke in *Sutton's Hospital*.⁵⁵

Sheppard's description of the automatic incidents arising from incorporation likewise resembled that of Coke. As such, among things "declaratory or explanatory, and inserted only in point of discretion, and for conveniency" are the following:

So the Clauses, to buy and sell, sue and be sued, have and use a common Seal, to restrain alienation or demise of the Land belonging to the Corporation. That the Survivors shall be Incorporate. That if the Revenues increase, they shall be employed to the publique use of the Corporation. To be visited by the Governours. To make Ordinances, That the Ordinary shall not visit it, License to purchase in Mortmain, and some general Clauses and Provisoos. The Corporation is well made without all this.⁵⁶

According to Sheppard, however, certain things often inserted in charters were in fact unlawful, including: (1) the making of ordinances for the imprisonment of men; (2) the forfeiting of goods upon disobedience to the internal rules created by the corporation for the governance of its members; (3) the restraining of the liberty of trade; and (4) the restraining of the corporation from having what is automatically incident to it.⁵⁷ Following this analysis of what does not need to be in the charter or is invalid if within the charter, Sheppard listed five requirements that every charter must contain: (1) a name; (2) a place "to fix and bottom the corporation"; (3) words to the effect that an incorporation is intended; (4) persons to be incorporated; and (5) good and lawful authority to erect the corporation.⁵⁸

Interestingly, Sheppard's next section stated that charters were considered of very little account, in that corporations not only did not have to include all of their powers therein but also that corporations often did not follow their own charters – something of a divergence from the importance that Coke places upon the charter.⁵⁹ Sheppard, at the end of his treatise, following Coke, stated that a corporation "cannot commit Treason, be Out-Law'd, Excommunicate, appear in person in a Court, be Sworn, Dye, and other such like Acts which a natural body may do."⁶⁰ Finally, Sheppard states "[i]f a summe of money be to be levied upon a

55. *Id.* at 273-79 (citing SHEPPARD, *supra* note 45, at 10-23).

56. SHEPPARD, *supra* note 45, at 41-42.

57. *Id.* at 43-44. Eaton criticized Sheppard for failing to distinguish between royal charters and parliamentary charters. According to Eaton, under English law, the courts may adjudge certain actions of the King to be unlawful, but not so with actions of Parliament. Because of this, he suggests that a charter granted by Parliament is in fact more valuable than a royal charter. Eaton, *supra* note 45, at 282. Sheppard's political bias as a member of Cromwell's government clearly shows through in his evaluation of the two types of charter grants.

58. SHEPPARD, *supra* note 45, at 6-23.

59. Eaton, *supra* note 45, at 284-85. Eaton was amazed by this discussion, especially in light of Sheppard's otherwise strong resonance of Coke. Note, however, that Coke as a judge was attempting to direct the law in the direction he felt appropriate, whereas Sheppard was more of a practitioner and an observer of what subsequently happened to the corporate charters he was responsible for granting under Cromwell's authority.

60. SHEPPARD, *supra* note 45, at 109 (citing *Coo.[sic] 10, Sutton's Hospital Case*).

Corporation, it may be levied upon the Mayor or chief Magistrate, or upon any Member of the Corporation.”⁶¹ Clearly, in Sheppard’s time, limited liability was not an incident of a corporation.⁶²

Overall, Sheppard’s book, while the first English book on corporations and one written by an acknowledged expert on the subject, does not really advance very much beyond Coke’s opinion in *Sutton’s Hospital*. Sheppard’s book does, however, illustrate the extent of Coke’s influence on the early law of corporations.

B. THE BUBBLE ACT OF 1720 AND LATER ENGLISH DEVELOPMENTS

In the last quarter of the seventeenth century, business in stock and share dealings began to increase, not only in England but also in Paris and Amsterdam, with the respective stock markets climbing to immense heights before crashing again to almost nothing.⁶³ Although generally regarded as a reaction to the confusion created by this in England, the Bubble Act of 1720 was not actually enacted to deal with the rapidly expanding boom, but rather to enable the English government, through the mechanism of the South Sea Company, to further encourage the exchange of government debt into South Sea Company shares.⁶⁴ Its result, however, retarded the development of the private business corporation in England for over one hundred years.

The Bubble Act of 1720⁶⁵ is divided into two parts: first, a grant of two charters to corporations engaged in assurance of ships and in bottomry, respectively;⁶⁶ and second, making any joint stock company operating without a charter illegal under severe penalty.⁶⁷ The first section is inter-

61. *Id.* at 126-27 (citing Rolls, C.J. in *B.R. Hill* (1652)).

62. Eaton suggests that this general liability is based upon the feudal duties that each townsman, burgher, etc., owed to his feudal lord—namely, payment of feudal dues. Eaton, *supra* note 45. Cooke, however, makes a clearer suggestion: essentially, general liability was based on the ability of other corporations, whether municipalities, merchants, or guilds, to charge any member of any corporation owing a debt with the full amount of the debt owed by the corporation. In other words, general corporate liability was a response to the needs of the time respecting the collection of debts. If one could not levy against the specific individual incurring the debt, then one could levy against any one of his corporate cohorts that might come within reach. Seemingly, not only would this precipitate the collection of debts owed by members of corporations, but would also encourage corporations to pressure their own members to pay their debts. See COOKE, *supra* note 2, at 25-27 (discussing the right of “withernam”).

63. COOKE, *supra* note 2, at 80-83. See generally, JOHN CARSWELL, *THE SOUTH SEA BUBBLE* (Sutton Pub. 2002).

64. The South Sea Company had assumed 31,000,000 pounds of debt which was to be exchanged at market prices for South Sea Company stock at market prices. The Bubble Act was passed on 11 June 1720, South Sea Company shares peaked on 24 June 1720, and the crash occurred in September of 1720. COOKE, *supra* note 2, at 82-83. Many earlier authors, however, viewed the Bubble Act as a reaction to the stock boom itself. See, e.g., H. A. Shannon, *The Coming of General Limited Liability*, 2 *Econ. Hist.* 267, 268 (1931).

65. “An act for better securing certain powers and privileges intended to be granted by his Majesty by two charters for assurance of ships and merchandizes at sea, and for lending money upon bottomry; and for restraining several extravagant and unwarrantable practices therein mentioned,” 6 Geo. I, c. 18 (1719).

66. *Id.* at I.-XVII.

67. *Id.* at XVIII.-XXIX.

esting due to certain provisions contained within the charters. The second is important because it essentially cut off the growth of the private corporation in England until the nineteenth century.

The two charters contained provisions establishing their important incidents: (1) a "distinct and separate body politick"; (2) perpetual succession; (3) the right to choose their respective directors, etc.; (4) a common seal; (5) rights to purchase and sell; and (6) to sue and be sued.⁶⁸ From this, despite the prevalence of Coke's influence, it seems that corporations still felt it best to include all their incidents within the charter, whether automatic or not. The charter detailed the capital of the corporation⁶⁹ and established that each shareholder would share in any profits only according to his proportional share thereof.⁷⁰ More interestingly, the charters established that as to any liabilities, court decisions, etc., each shareholder was only liable for his proportional share of such liabilities and established penalties (essentially forfeit of shares) necessary to enforce such payments.⁷¹ Further, all shares in the corporations were freely transferable.⁷² Finally, among other incidents, the corporations were given power to establish their own by-laws and ordinances.⁷³ While these companies were only created through charters and not pursuant to any general view of corporate powers and attributes, the companies thereby established were very similar to the attributes generally attributed to modern corporations, i.e., perpetuity of existence, limited liability of shareholders, central direction through a board of directors, and free transferability of shares.⁷⁴ The conclusion then is that even as early as 1719, essentially modern corporate structures could be created, though the incidents were still only by contract and not automatically by established law.

The second section of the Bubble Act of 1720 essentially halted further progress of the development of the private business corporation in England:

68. *Id.* at I.

69. *Id.* at II.-V.

70. Each person is entitled to "a proportional share of the profits and advantages attending the capital stock of such corporation respectively . . . ; but that no person or persons shall be entitled to any greater share in the capital or nominal stock of either of such respective corporations, than the money which he, she or they shall have paid towards the same." *Id.* at VI.

71. *Id.* at VII. At this time, shareholders often did not pay their entire subscription in advance but rather were liable for calls on such sums as necessary; however, under these charters shareholders were only liable up to the maximum of their share of callable capital. In other words, while shareholders were liable beyond their initial payment, they were not liable beyond their maximum allotted subscription.

72. *Id.* at IX.

73. *Id.* at XI. This is especially indicative of the advanced nature of the private business corporation in England at this time. Later commentators have suggested that in the United States shares were not freely transferable at all until the late nineteenth century. See generally Conard, *supra* note 22.

74. See generally, Gower, *supra* note 2, and COOKE, *supra* note 2, for a discussion of the modern attributes of the corporate form.

That from and after the four and twentieth day of June one thousand seven hundred and twenty, all and every the undertakings and attempts described, as aforesaid, and all other publick undertakings and attempts, tending to the common grievance, prejudice and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all publick subscriptions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all other matters and things whatsoever, for furthering, countenancing or proceeding in any such undertaking or attempt, and more particularly the acting or presuming to act as a corporate body or bodies, the raising or pretending to raise transferable stock or stocks, the transferring or pretending to transfer or assign any share or shares in such stock or stocks, without legal authority, either by an act of parliament, or by any charter from the crown, for particular or special purposes therein expressed, by persons who do or shall use or endeavour to use the same charters, for raising a capital stock, or for making transfers or assignments, or pretended transfers or assignments of such stock, not intended or defined by such charter to be raised or transferred, and all acting or pretending to act under any obsolete charter become void or voidable by nonuser or abuser, or for want of making lawful elections, which were necessary to continue the corporations thereby intended, shall . . . for ever be deemed to be illegal and void, and shall not be practiced or in any wise put in execution.⁷⁵

In short, the private business company (termed the "joint stock company" in English practice) as it was developing up to that time in England was effectively terminated. No new joint stock companies could be formed, although previous charters continued in existence. Interestingly, the provisions of the Act were written in such a way as not to effect any of the existing regulated companies, including the South Sea Company—generally agreed to have been the major culprit in the events resulting in the often incorrectly viewed necessity of enacting the Bubble Act itself.⁷⁶ By its provisions, the Act did not apply to partnerships, but to some extent this provision makes the act more unclear and therefore more destructive to business than it was by its own terms.⁷⁷ Overall, the Act,

75. 6 Geo. I, c. 18 at XVIII.

76. See generally, CARSWELL, *supra* note 63. Cooke, however, suggests a different and perhaps more accurate view of the situation. Essentially, one of the functions of the South Sea Company had been to assume the entirety of the government debt and sell off shares to finance that debt. With such a situation in mind, so long as the stock of the South Sea Company continued to climb, the government debt could continue to be increased; unfortunately, other joint stock companies were coming into existence and absorbing large amounts of the capital that the government would have preferred to go into increasing the debt. To that end, Parliament passed the Bubble Act to prevent the creation of new corporations that might diminish the value of South Sea Company stock. As evidence of his point, Cooke suggests that in fact the price of South Sea Company shares hit its highest mark *after* the passage of the Bubble Act and that prices did not come down until the true extent of the widespread corruption involved came to the surface. See COOKE, *supra* note 2, at 80-83.

77. "That nothing in this act shall extend, or be construed to extend to prohibit or restrain the carrying on of any home or foreign trade in partnership in such manner as hath been hitherto usually, and may be legally done according to the laws of this realm now in

while retarding the development of the corporate form, probably did not retard overall business development although it did force most such businesses to be created under contract (typically based on partnership structures) rather than under general provisions of corporate law.⁷⁸

1. *Blackstone's Commentaries*

In chapter eighteen of his *Commentaries*, Blackstone addressed the general law of corporations.⁷⁹ Blackstone first spoke of the usefulness of the corporation:

[I]t has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.⁸⁰
[Accordingly,] [t]hese artificial persons are called bodies politic, bodies corporate, or corporations . . .⁸¹

Blackstone divided corporations first into aggregate and sole.⁸² "Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever. . . ."⁸³ Corporations sole consisted of only one person and his successors in some particular station who for certain reasons required the advantages of perpetuity.⁸⁴ Corporations were further divided into ecclesiastical and lay. Ecclesiastical corporations were made up entirely of religious persons, and have not existed at all in the United States without formal incorporation.⁸⁵ Lay corporations were then divided into civil and eleemosynary, with the eleemosynary sort "constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed."⁸⁶

Blackstone stated that "in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly

force." *Id.* at XXV. In fact, in the eighteenth century there was only one case under the act, although the defendant was in fact found guilty of "setting up a bubble called the North Sea." *R. v. Cawood*, 2 Ld. Raymond 1361 (1724). The Act was revived briefly in the early nineteenth century, but in 1825, the Attorney-General declared that "it appears to be agreed on all hands that [the Act's] meaning and effect are altogether unintelligible." Shannon, *supra* note 64, at 270 (citing 13 *Hansard* 1019 (1825)). The Act was officially repealed in 1825. 6 Geo. IV, c. 91 (1825).

78. COOKE, *supra* note 2, at 85-88. Many commentators suggest that while the Act was not really enforced, its prohibitions were both so potentially disastrous and so absolutely incomprehensible that it forced businesses to develop less efficient forms than otherwise might have been the case. See *id.* See also, Shannon, *The Coming of General Limited Liability*, *supra* note 64, at 270: "[I]n creating a greater reluctance to grant charters of incorporations, the Act had its greatest influence against the joint-stock form."

79. 1 WILLIAM BLACKSTONE, COMMENTARIES *467.

80. *Id.*

81. *Id.*

82. *Id.* at 469.

83. *Id.*

84. These corporations are rare in this country but examples include Roman Catholic Bishops, who are generally incorporated as corporations sole.

85. 1 BLACKSTONE, *supra* note 79, at *470.

86. *Id.* at *470-71.

given. The king's implied consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence."⁸⁷ Consent was also assumed in cases of prescription in cases where corporations had existed as corporations since "time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created."⁸⁸ Consent was expressly given by either (1) an act of parliament or (2) a charter granted by the king.⁸⁹

Blackstone listed five necessary incidents to the creation of any corporation: (1) to have perpetual succession; (2) to sue and be sued, implead or be impleaded, grant or to receive, by its corporate name, and do all other acts as a natural person; (3) to purchase and hold lands; (4) to have a common seal; and (5) to make by-laws or private statutes.⁹⁰ Here, Blackstone essentially does nothing more than reprise Coke in *Sutton's Hospital*. As to privileges and disabilities, Blackstone also followed Coke's theory of the corporation:

It must always appear by attorney; for it cannot appear in person, being, as sir Edward Coke says, invisible, and existing only in intendment and consideration of law. It can neither maintain, or be made defendant to, an action of battery or such like personal injuries: for a corporation can neither beat nor be beaten, in its body politic. A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities. Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood.⁹¹

Likewise following Coke, Blackstone stated that corporations are empowered only to the extent of their charters. Namely, "[t]he general duties of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one; that of acting up to the end or design, whatever it be, for which they were created by their founder."⁹² Unlike previous writers, Blackstone made clear what he meant by the right of visitation. Essentially, visitation by the sovereign meant that corporations are amenable to suit in the King's courts for their actions, etc.⁹³

As for the real effect of visitation, one must look to Blackstone's discussion of the dissolution of corporations—an area seemingly not previously addressed in any coherent form. According to Blackstone, a corporation could be dissolved in four ways: (1) by act of parliament; (2) by the natural death of all its members, in case of an aggregate corporation; (3) by forfeiture of its charter, through negligence or abuse of its

87. *Id.* at *472.

88. *Id.* at *473.

89. *Id.*

90. *Id.* at *475.

91. *Id.* at *476-77.

92. *Id.* at *480.

93. *Id.* at *481.

franchises; and (4) by surrender of its franchises into the hands of the king.⁹⁴ The third of these mechanisms is striking because it suggests that if the corporation breached the contract made by its charter, then the incorporation was void and the corporation ceased to exist. Forfeiture of a corporate charter through abuse of franchise also would appear to give teeth to the power of visitation: after all, if the sovereign could visit the corporation, discover it had abused its mandate, and subsequently revoke the corporate charter, then such a situation would indicate a real power of sovereign regulation over corporate power.

2. *Adam Smith and The Wealth of Nations*

Adam Smith addressed corporations in his famous work, *The Wealth of Nations*, published in 1776.⁹⁵ Although *The Wealth of Nations* is not a legal treatise, it is nonetheless illustrative of the contemporary view of corporations, and further detailed the views of one of the foremost economic thinkers on the subject—an economic thinker who was in fact trained as a lawyer. Overall, Smith was not fond of the idea of large companies: “These companies, though they may, perhaps, have been useful for the first introduction of some branches of commerce, by making, at their own expense, an experiment which the State might not think it prudent to make, have in the long run proved, universally, either burdensome or useless, and have either mismanaged or combined trade.”⁹⁶ Interestingly, despite Smith’s significant abilities in other areas of economics, he missed the future importance of the corporate form (although he did foreshadow its early development in America).⁹⁷

Smith began by dividing companies into two types: (1) regulated companies and (2) joint stock companies.⁹⁸ Regulated companies were “obliged to admit any person, properly qualified, upon paying a certain fine, and agreeing to submit to the regulations of the company, each member trading upon his own stock, and at his own risk.”⁹⁹ Such corporations resembled the guilds then existing throughout Europe, which generally had some sort of a monopoly over trade, regulated through the devices of fines and apprenticeship.¹⁰⁰ Altogether, Smith had little use for this sort of a monopoly.¹⁰¹ Smith cited as another example of the regu-

94. *Id.* at *485.

95. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), reprinted in 18 *A Library of Universal Literature* (1901).

96. *Id.* at 100.

97. See COOKE, *supra* note 2, at 91. “The accuracy of Adam Smith’s observations is confirmed from American Experience, for the prominent joint stock companies of the United States in the first thirty years of independence were banks, stage companies, turnpike companies, canal companies, water companies and insurance companies.” *Id.* (citing JOSEPH S. DAVIS, 2 *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 297 (1917)).

98. SMITH, *supra* note 95, at 100-01.

99. *Id.* at 100.

100. *Id.* at 101.

101. Smith was against the granting of monopolies in any form:

lated company, the “regulated companies for foreign commerce.”¹⁰² These companies were given a monopoly in a certain trade, and Smith was no less critical of this type: “[T]hough such companies may not, in the present times, be very oppressive, they are certainly altogether useless. To be merely useless, indeed, is perhaps the highest eulogy which can ever justly be bestowed upon a regulated company.”¹⁰³ Further, according to Smith, the object of all regulated companies as put forth through their by-laws was “not so much to oppress those who are already members, as to discourage others from becoming so.”¹⁰⁴ As to these state established monopolies, history agrees with Smith that they are not good for commerce; however, Smith was almost equally opposed to the joint stock company form itself, even without monopoly powers.

Joint stock companies were established either by royal charter or by act of Parliament.¹⁰⁵ Smith here moved beyond earlier authors in that he in fact attributed somewhat different attributes to different types of companies and actually differentiated between various private companies and municipal corporations.¹⁰⁶ Smith listed two principal differences between partnerships¹⁰⁷ and joint stock companies. First, “in a private copartnery, no partner, without the consent of the company, can transfer his share to another person, or introduce a new member in to the company.”¹⁰⁸ In a joint stock company, the shares were freely transferable: “In a joint stock company . . . no member can demand payment of his share from the company, but each member can, without their consent, transfer his share to another person, and thereby introduce a new member.”¹⁰⁹ Further, the values of such shares were to be determined by the market rather than the shareholder’s actual share of the company.¹¹⁰ The second difference according to Smith was that “in a private copartnery, each partner is bound for the debts contracted by the company to the whole extent of his fortune. In a joint stock company, on the contrary, each partner is bound only to the extent of his share.”¹¹¹ Smith thus described the essential

When they have been allowed to act according to their natural genius, they have always, in order to confine the competition to as small a number of persons as possible, endeavored to subject the trade to many burdensome regulations. When the law has restrained them from doing this, they have become altogether useless and insignificant.

Id.

102. *Id.* He cites as examples the Hamburg Company, the Russia Company, the Eastland Company, the Turkey Company, and the African Company. *Id.* at 102.

103. *Id.* at 103.

104. *Id.* at 104.

105. *Id.* at 111.

106. Smith terms municipal corporations as “corporations,” thereby differentiating them from “companies,” and discusses them elsewhere in his work. *Id.*

107. Smith terms these “private copartneries.” *Id.*

108. *Id.* Interestingly, “[e]ach member . . . may, upon proper warning, withdraw from the copartnery, and demand payment from [the other partners for] his share of the common stock.” *Id.*

109. *Id.*

110. *Id.*

111. *Id.* The exact meaning is somewhat unclear; however, generally at this time, shareholders agreed to be responsible for a certain amount of total capital even though gener-

modern difference between partnerships and corporations: (1) free transferability and (2) limited liability.¹¹²

Smith next described how joint stock companies are “always managed by a court of directors,” which is “frequently subject, in many respects, to the control of a general court of proprietors.”¹¹³ Here, Smith described the modern governmental structure of a corporation: a board of directors responsible in general to the shareholders. Unfortunately, this aspect was and continues to be a central problem with the form of the joint stock company: the conflict created by the separation of ownership and control.¹¹⁴ According to Smith:

the greater part of these proprietors seldom pretend to understand anything of the business of the company; and when the spirit of faction happens not to prevail among them, give themselves no trouble about it, but receive contentedly such half-yearly or yearly dividend, as the directors think proper to make to them.¹¹⁵

Such “total exemption from trouble and from risk, beyond a limited sum, encourages many people to become adventurers in joint stock companies, who would, upon no account, hazard their fortunes in any private copartnery.”¹¹⁶ Smith did admit that because of this “exemption from trouble and from risk,” joint stock companies were able to raise significantly more capital than almost any private copartnery.¹¹⁷ While this may indicate that these ventures were seen in terms of gambling, many small merchants and other persons with excess, although not necessarily significant, capital could thereby take part in potentially profitable adventures. Further, given that paid in capital was generally not equivalent to total capital, many would buy in for relatively small amounts, although with potentially greater liability—in many ways perhaps not too dissimilar from buying stock on margin today.

Given this description, Smith raised a very valid economic objection to this form of business:

The directors of such companies . . . being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company.¹¹⁸

ally they did not pay it all in at any given time. The result, then, is functional limited liability even though the shareholder could potentially be liable beyond the amount of his actual investment, but only up to the maximum amount he was responsible for.

112. See COOKE, *supra* note 2, at 18. Cooke, in fact, based his entire analysis of the development of the modern English corporation upon the analysis of these two factors.

113. SMITH, *supra* note 95, at 111. For a description of the operation of this structure in the context of the English East India Company, see Keay, *supra* note 27, at 25-29.

114. See generally, BERLE & MEANS, *supra* note 3.

115. SMITH, *supra* note 95, at 111-12.

116. *Id.* at 112.

117. *Id.*

118. *Id.*

Smith stated this as the reason why joint stock companies for foreign trade had seldom been able to compete with private adventurers, at least without a monopoly, and given a monopoly, these companies had “both mismanaged and confined” trade.¹¹⁹ Overall, Smith presented the economic basis for the well-developed law of fiduciary duty in the context of corporation in the U.S.¹²⁰ The only cases where such companies have succeeded, according to Smith, were those in which such companies were composed of a small number of proprietors, with a moderate capital—cases when the form approached that of a private “copartnership.”¹²¹

Smith went on to suggest that sometimes a joint stock company may in fact serve the best interests of the state:

When a company of merchants undertake, at their own risk and expense, to establish a new trade with some remote and barbarous nation, it may not be unreasonable to incorporate them into a joint stock company, and to grant them, in case of their success, a monopoly of the trade for a certain number of years.¹²²

Smith compared such a situation to a patent or copyright and suggested that the public benefits of such a temporary situation outweigh the usual costs, so long as the monopoly was only temporary.¹²³

Accepting the conclusion that joint stock companies may sometimes be of use, Smith described the situations in which they might be successfully and advantageously incorporated without being granted monopoly privileges:

The only trades which it seems possible for a joint stock company to carry on successfully, without an exclusive privilege, are those of which all the operations are capable of being reduced to what is called a routine, or to such a uniformity of method as admits of little or no variation.¹²⁴

Assuming this predicate, Smith listed four such situations: (1) banking; (2) insurance; (3) the making of canals; and (4) the bringing of water to a city.¹²⁵ Interestingly, these are the principal types of early corporation established in the United States.¹²⁶ Given these four types, Smith then explained how in his view these businesses may be reduced to the terms he requires for the success of a joint stock company. Along with the general reduction to routine within the operations of the business, Smith re-

119. *Id.* Smith cites as the prime example of this theory, the previously described experience of the South Sea Company in the early 1700s—by his terms, a company with “an immense capital divided among an immense number of proprietors.” *Id.* at 116.

120. For a review of the subsequent development of the laws of shareholder rights and corporate responsibilities, see CONARD, *supra* note 22.

121. SMITH, *supra* note 95, at 115.

122. *Id.* at 129.

123. *Id.*

124. *Id.* at 131. Smith means that the only successful joint stock companies will be those which rely on economies of scale and scope as to capital, rather than those depending more on the abilities of the management. As already seen, Smith viewed the management of the joint stock company as its greatest liability.

125. *Id.* at 131.

126. See generally, DAVIS, *supra* note 97.

quired two additional circumstances: "First, it ought to appear with the clearest evidence, that the undertaking is of greater and more general utility than the greater part of common trades; and secondly, that it requires a greater capital than can easily be collected into a private copartnery."¹²⁷ These are in fact the two general benefits on which most theorists base the success of the early business corporation in America: (1) general public utility and (2) the need for greater aggregate capital than typically available.¹²⁸ Overall, however, outside of these areas, Smith concluded that the joint stock company in general is made unmanageable by the centralized control of the directors:

The joint stock companies which are established for the public-spirited purpose of promoting some particular manufacture, over and above managing their own affairs ill, to the diminution of the general stock of the society, can in other respects scarce even fail to do more harm than good. Notwithstanding the most upright intentions, the unavoidable partiality of their directors to particular branches of the manufacture, of which the undertakers mislead and impose upon them, is a real discouragement to the rest, and necessarily breaks, more or less, that natural proportion which would otherwise establish itself between judicious industry and profit, and which, to the general industry of the country, is of all encouragements the greatest and most effectual.¹²⁹

3. *Kyd's A Treatise on the Law of Corporations*

Angell and Ames suggested that Stewart Kyd wrote the first English language treatise solely on the subject of corporations in 1793;¹³⁰ however, as already discussed this was in fact not the case. Overall, Kyd added little in the way of development of the corporation, especially since his work focused almost exclusively on municipal corporations. Instead, he really only suggests the continued continuity of the form with Coke's earlier formulations.

Kyd defined a corporation as:

A corporation, or body politic, or body incorporate is a collection of many individuals united in one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of law, with a capacity of acting, in several respects, as an individual, particularly of taking and granting property, contracting obligations, and of suing and being sued; of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence.¹³¹

127. SMITH, *supra* note 95, at 133.

128. *See generally*, Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporations*, ch. 5 J. ECON. HIST. 1 (1945).

129. SMITH, *supra* note 95, at 134-35.

130. Stewart Kyd, *A Treatise on the Law of Corporations* (1793).

131. 1 Kyd at 12.

Kyd then listed five necessary incidents to any proper incorporation: (1) perpetual succession; (2) to sue and be sued, implead and be impleaded, grant and receive, and do all other acts as a natural person; (3) to purchase and hold lands; (4) to have a common seal; and (5) to make by-laws.¹³² While these are the necessary incidents, Kyd required only three requirements to form what he called "the complete idea of the corporation aggregate": (1) to have perpetual succession under a special denomination and under an artificial form; (2) to be able to take and grant property, to contract obligations, and to sue and be sued by its corporate name, in the same manner as an individual; and (3) to receive grants of privileges and immunities from the state and for members to enjoy them in common.¹³³

II. AMERICAN DEVELOPMENT TO THE *DARTMOUTH COLLEGE CASE*

Early development in the U.S. was the result of development in England up to approximately 1776.¹³⁴ In 1741 the Bubble Act of 1720 was officially extended to apply to the colonies as a result of the operations of the Land-bank of Massachusetts.¹³⁵ Admittedly, as in England, the unpredictability of this Act probably slowed down the development of the corporation in the United States until the time of the Revolution, although in this early period the absence of necessary concentrations of individuals with capital to invest probably slowed development more than any other factor.¹³⁶ Further, in the U.S., as in England, businesses were formed according to private articles of agreement, so that even though actually partnerships, these businesses approximated the joint stock form.¹³⁷ According to Williston, in 1768 Pennsylvania chartered the first American business corporation and the only business corporation whose charter predated the Declaration of Independence, The Philadelphia

132. *Id.* at 69.

133. *Id.* at 70.

134. According to Bowman, three factors are most significant in explaining "the virtual absence of English law pertaining to the business corporation at the time of American independence": (1) industrial and trading monopolies of the fifteenth and sixteenth centuries were mostly quasi-public corporations; and (2) the Bubble Act; and (3) British lawyers and jurists declined the opportunity when presented. BOWMAN, *supra* note 2, at 40 (citing DUBOIS, *supra* note 2, at 86).

135. Simeon E. Baldwin, *History of the Law of Private Corporations in the Colonies and States*, in 3 SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY 236, 246 (1909). The "Manufacturing Company" or Land-bank of Massachusetts apparently circulated its own bills (i.e. currency) in the amount of nearly 50,000 pounds sterling against the protest of the royal Governor. The Land-bank was purported to have been incorporated in Massachusetts, but Baldwin found no evidence that such incorporation in fact occurred. *Id.* at 244 n.1.

136. Handlin & Handlin, *supra* note 128, at 5; Baldwin, *supra* note 135, at 246.

137. Shaw Livermore, *Unlimited Liability in Early American Corporations*, 43 J. OF POL. ECON. 674, 674 n.2 (1935). Such partnerships were numerous in England by 1760 and also began to appear in America around this time. *Id.*

Contributionship for Insuring Houses from Loss by Fire.¹³⁸

A. GROWTH OF THE AMERICAN BUSINESS CORPORATION

Most commentators agree that the Revolution in the United States and the subsequent adoption of the Constitution in 1789 provided the basis for the rapid development of the private business corporation in the United States.¹³⁹ While the Bubble Act was not officially repealed at that time, with independence it ceased to restrain corporate development in the United States.¹⁴⁰

As empirical evidence of this proposition, the United States produced almost 350 corporations between 1783 and 1801, and by 1789 Massachusetts even had an early general incorporation law for aqueduct corporations.¹⁴¹ By 1787, five more joint stock business corporations were chartered in America in addition to the fire insurance company first chartered in Pennsylvania: "The Bank of North America," chartered by Congress in 1781, and by Pennsylvania in 1787; "The Massachusetts Bank," in 1784; "The Proprietors of the Charles River Bridge," in 1785; "The Mutual Assurance Co." (Philadelphia), in 1786; and "The Associated Manufacturing Iron Co." (New York), in 1786.¹⁴² Despite Smith's theories of corporate irresponsibility,¹⁴³ corporations began increasingly to compete with older structures in manufacturing and other previously unincorporated forms of business.¹⁴⁴ Interestingly, these developments were centered almost entirely in New England, with only fifteen percent of the total being created in New York and Pennsylvania.¹⁴⁵

The question arises then as to why this sudden development of corporations in the United States occurred during this period.¹⁴⁶ Simeon Baldwin in a study of the American business corporation before 1789 suggested two essential reasons to use 1789 to mark the beginning of the original period of corporate development in the United States: (1) events in France and (2) events in the United States.¹⁴⁷ In France, the States General was convened and began to pull down the ancient French forms of central authority.¹⁴⁸ In the United States, the First Congress began work on creating a government based on a narrowly defined central gov-

138. Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 149, 165 (1888).

139. See, e.g., HANDLIN & HANDLIN, *supra* note 128, at 2. .

140. See *id.* at 5.

141. *Id.* at 4 n.20.

142. *Id.*

143. See discussion *supra*, Part I.B.2.

144. HANDLIN & HANDLIN, *supra* note 128, at 6.

145. *Id.* at 7. By 1830, the chartered capital of banks and insurance companies in Massachusetts alone amounted to about \$30,000,000, with various manufacturing companies holding even more. *Art VI.—Corporations*, 4 AM. JURIST & L. MAG. 298, 300 (1830).

146. See, e.g., Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51 (1993).

147. Simeon E. Baldwin, *American Business Corporations Before 1789*, in 1 ANN. REP. OF THE AM. HIST. ASS'N, or the year 1902, 255 (1903).

148. *Id.* at 255.

ernment, strong within its purview, combined with a system of strong local governments.¹⁴⁹ According to Baldwin, until the strong and secure central government was established by the Constitution, thereby signaling final freedom from the restraints then existing in England, corporations established by the state could not begin to multiply effectively. As evidence of the importance of this event, Baldwin details the creation of only six distinctly American corporations before 1776.¹⁵⁰

Most commentators noted three attributes of the American business corporation by 1789: (1) fictitious personality and centralized management; (2) limited liability of shareholders for debts of the corporation; and (3) freedom from government interference through the mechanism of the perpetual charter.¹⁵¹ The Handlins, however, demonstrated that these attributes were not in fact in place by this time, but rather that corporate development nonetheless accelerated during this period. First, Handlin and Handlin suggest that structurally the corporate form had few advantages over other business forms.¹⁵² Second, they suggest that the existence of limited liability may explain the acceleration of the use of the corporate form in the United States during this period but quickly discount that as the dispositive factor since so few corporations requested that privilege during this period.¹⁵³ Further, the Handlins suggest that the idea of limited liability is not even really suggested in the law at this time, despite the historical view of the corporate common purse.¹⁵⁴ In light of this state of affairs, the Handlins suggest that limited liability was not

149. *Id.* at 255-56.

150. *Id.* at 257. The six pre-1776 corporations were: (1) "The New York Company 'for Settling a Fishery in these parts'" (1675); (2) "The Free Society of Traders," in Pennsylvania (1682); (3) "The New London Society United for Trade and Commerce in Connecticut" (1732); (4) "The Union Wharf Company in New Haven" (1760); (5) "The Philadelphia Contributionship for the Insuring of Houses from Loss by Fire" (1768); and (6) "The Proprietors of Boston Pier, or the Long Wharf, in the Town of Boston in New England" (1772). *Id.*

151. Handlin & Handlin, *supra* note 128, at 2.

152. *Id.* at 8.

153. *Id.* at 8-9. At this time, limited liability of shareholders for corporate debts was only available if requested as a privilege to be granted in the charter by the incorporating state. See Livermore, *supra* note 137. According to Livermore, during this period, various states in fact imposed general liability on corporations, only to repeal these provisions later. Massachusetts imposed general liability in 1808, then repealed the statute in 1829. Maine rejected unlimited liability in 1823, soon after its establishment. Throughout this period, Connecticut dealt with the matter solely through the charters themselves. Interestingly, New York's 1811 general incorporation act, New York Statutes, VII, 233, imposed general liability although this was not widely recognized. *Id.* at 677-87. Overall, limited liability in the United States was certainly not clear until at least 1832.

154. Under the doctrine of the common purse, a corporation or joint stock company's debts were first charged against the common purse; however, the exhaustion of the common purse did not mean that the shareholders were no longer liable. Handlin & Handlin, *supra* note 128, at 10. The authors suggest that Lord Kenyon's decision in *Russell v. Men of Devon*, 2 T.R. 672 (1788), reprinted in 29 Eng. Rep. 359, 362 (K.B. 19009), which is often cited as upholding limited liability in fact only held that the absence of a corporate fund was evidence that an English county was in fact not a corporation. *Id.* at 10 n.51. Angell and Ames later suggested that in fact the existence of a common purse was the differentiating factor between a municipal corporation and a private corporation. See discussion *infra*, Part III.

really an issue because at this time corporations still used assessments against individual shareholders for funds, rather than a full payout at the start up of the enterprise.¹⁵⁵ Shareholders thus continued to be liable for additional assessments to cover corporate needs.¹⁵⁶ Finally, the Handlins assert that freedom from state interference through the mechanism of the charter as contract did not become in any way settled until the *Dartmouth College* decision.¹⁵⁷

Accordingly, the development of the American business corporation during this period was not necessarily a result of the attributes of economic efficiency, limited liability, or freedom from state interference.¹⁵⁸ Rather, the Handlins assert that corporations developed in the United States during the last two decades of the eighteenth century as a result of their essentially democratic character. In other words, corporations were conceived as "an agency of government, endowed with public attributes, exclusive privileges, and political power, and designed to serve a social function for the state."¹⁵⁹ For this reason, early corporations were primarily semi-public institutions such as turnpikes and banks, rather than capitalistic ventures such as trade and land speculation.¹⁶⁰ Corporations, then, spread benefits across society and transformed the corporate institution from a mechanism designed to protect privileges, as in Europe, to one of essentially democratic character designed to allow development of public enterprises that otherwise could not have taken place, especially since significant accumulations of wealth necessary for large scale projects did not exist in the early nineteenth century.¹⁶¹ The extension of corporate status, sovereign power, and economic privilege by the state allowed private associations of individuals to accomplish projects beyond their individual means, thus satisfying both economic necessity and republican ideology.¹⁶²

155. Handlin & Handlin, *supra* note 128, at 13.

156. *Id.* at 14-16 (citing various statutes and charters imposing general liability upon members of corporations).

157. See discussion *infra* Part II.B.

158. Handlin & Handlin, *supra* note 128, at 22.

159. *Id.* Tocqueville also felt that the corporation fit the American cultural scene in that it was an ideal instrument by which a republican government could perform its obligations to enterprising citizens. See ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 342 (J.P. Mayer & Maxlenney eds., George Lawrence trans., Harper & Rou 1966) (1817).

160. Handlin & Handlin, *supra* note 128, at 22.

161. *Id.* at 23. For a general discussion of the problem, see G.S. Callender, *The Early Transportation and Banking Enterprises of the States in Relation to the Growth of Corporations*, 17 Q.J. ECON. 111 (1902).

162. R. Kent Newmyer, *Justice Joseph Story's Doctrine of 'Public and Private Corporations' and the Rise of the American Business Corporation*, 25 DEPAUL L. REV. 825, 826 (1976) (citing EDWIN MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860 WITH SPECIAL REFERENCE TO MASSACHUSETTS* 11 (1954)). According to Dodd: "[B]y 1830 the New England states alone had created nearly 1,900 business corporations, including nearly 600 manufacturing and mining companies in addition to public utilities, banks, insurance companies, and a few business enterprises of other types." *Id.*

B. ANTI-CORPORATE ARGUMENTS

A notable feature of this important developmental period was the general debate regarding the corporate form itself.¹⁶³ Although this early disagreement in America centered on municipal corporations, the views expressed were later used in debates regarding the private business corporation.¹⁶⁴ Arguments against corporations were generally based on the assertion that they were by nature undemocratic and symbols of the order that had been rejected in the Revolution.¹⁶⁵ Other principled arguments focused on the idea that "corporations violated the sovereignty of the people by granting privileges to a limited number of persons separated from the rest of the population."¹⁶⁶

Conversely, corporate proponents did not necessarily differ about the history of corporations or about the origin of such privileges.¹⁶⁷ Proponents, however, drew different conclusions about the present need for corporations in America. Basically, they argued that because corporations allowed groups to conduct business through the mechanism of self-rule and elected representatives, corporations were essentially democratic institutions.¹⁶⁸ As such, corporations reflected the best expression of American democracy in a business context. By 1789, while the debate continued as to the nature and need for private corporations, municipal corporations had established their place in America if by nothing else than by the volume of municipal charters that were requested, granted, and used.¹⁶⁹

Arguments against the emerging business corporation largely followed the pattern established in the debate over municipal corporations¹⁷⁰ and continued well into the nineteenth century.¹⁷¹ In the case of business corporations, criticisms were especially strong against corporations in that they have little public benefit.¹⁷² Further, anti-monopoly proponents who followed Smith argued strongly against the creation of any sort of monopolistic corporate business venture.¹⁷³ Business corporations, even without monopoly powers, were charged with contributing to an improper distribution of wealth.¹⁷⁴ After all, since corporations had the potential for perpetual succession, property could be tied up indefinitely and thereby never transferred according to policies of distribution of wealth as evi-

163. See Maier, *supra* note 146, at 60. Newmyer agrees: "Despite the congeniality between the corporation and government, there was a large area of conflict and tension between the two during the formative period of corporate development." Newmyer, *supra* note 162, at 826.

164. Maier, *supra* note 146, at 58-60.

165. *Id.* at 61.

166. *Id.* at 62.

167. *Id.*

168. *Id.* See TOQUEVILLE, *supra* note 159.

169. Maier, *supra* note 146, at 63-64.

170. *Id.* at 65.

171. *Id.*

172. *Id.* at 66.

173. *Id.* at 67-68.

174. *Id.* at 69.

denced by American laws of distribution, succession, and taxation.¹⁷⁵ As corporations continued to multiply, the argument based on the charges of accumulated corporate property became stronger,¹⁷⁶ especially after the *Dartmouth College* decision.¹⁷⁷ In fact, estimates suggested that corporations owned perhaps one-fifth of all property in Massachusetts by 1827.¹⁷⁸ Corporations were accused of corruption as well, following the attempts of the Second Bank of the United States to have its charter renewed.¹⁷⁹ Finally, Smith's arguments of corporate inefficiency as a method of economic development were often voiced during this time.¹⁸⁰

C. THE DARTMOUTH COLLEGE CASE

Justice Joseph Story has been credited with the transformation of American corporate law into the modern business organization that it has become today.¹⁸¹ To a large extent, Justice Story's decision in *Trustees of Dartmouth College v. Woodward*¹⁸² was the basis of the later development of corporate law in the United States.¹⁸³ The decision in *Dartmouth College*, however, was far from a clear resolution. In fact, in *Head & Amory v. Providence Insurance Co.*,¹⁸⁴ the Supreme Court emphasized the public nature of the corporation and implied legislative control over it with Chief Justice Marshall's declaration that the corporation "is the mere creature of the act to which it owes its existence," and that "all its powers" and the manner in which they may be used is determined by the act of state creating its existence.¹⁸⁵ Overall, this decision was based largely on the doctrine philosophy that in order to exist, the corporation had to provide some sort of public benefit; however, in respect to new manufacturing companies, this requirement and in fact the need for such a requirement was becoming increasingly unclear.¹⁸⁶ Further, in order to encourage investment of capital in these corporate ventures, investors had to be assured that the state in actuality did not control the fate of their investments.¹⁸⁷

In *Fletcher v. Peck*,¹⁸⁸ the Court held that a legislative grant to a private land company was a contract within the meaning of article I, section 10 of

175. *Id.* at 69-70.

176. *Id.* at 70.

177. *See supra* Part II.

178. Maier, *supra* note 146, at 70 (citing Lincoln, *Mozart Association Veto*, in *RESOLVES OF THE GENERAL COURT FOR 1824-1828*, 474-76). Maier suggests that this figure excludes new banking, insurance, and canal companies, so the percentage of capital held in corporations was probably even higher. *Id.*

179. *Id.* at 72-73.

180. *Id.* at 72.

181. *See Newmyer, supra* note 162.

182. 17 U.S. (4 Wheat.) 518 (1819).

183. *See Newmyer, supra* note 162.

184. 6 U.S. (2 Cranch) 127 (1804).

185. *Id.* at 167.

186. *See Newmyer, supra* note 162, at 827.

187. *Id.*

188. 10 U.S. (6 Cranch) 87 (1810).

the Constitution;¹⁸⁹ however, *Dartmouth College* extended this to hold that a corporation's state charter also a contract within the meaning of the contract clause¹⁹⁰. Accordingly, "[l]egislative charters vested property rights in the corporation which could not be altered unless the right to do so had been specifically reserved in the charter."¹⁹¹ As a result of this assurance of protection from state interference, capital flowed into corporations, thereby ensuring their preeminence in the United States as vehicles of economic growth.¹⁹²

Overall, the issue in *Dartmouth College* centered on whether the New Hampshire law that essentially reformulated the original college charter was in fact repugnant to the United States Constitution and more specifically, whether a corporate charter was a contract within the meaning of the contract clause. At the beginning of the 1819 term, the court held that the corporate charter was a contract; Chief Justice Marshall delivered the majority opinion, Justices Washington and Story concurred separately, and Justice Duvall registered a silent dissent.¹⁹³ Marshall's opinion spent little time analyzing whether the charter was in fact a contract but simply asserted that it was.¹⁹⁴

In *Dartmouth College*, Chief Justice Marshall gave his definition of a corporation:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyance for the purpose of transmitting it hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it is created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a State instrument, than a natural per-

189. *Id.*

190. *Id.*

191. Newmyer, *supra* note 162, at 828.

192. *Id.*

193. *Dartmouth Coll.*, 17 U.S. (4 Wheat) 518 (1819).

194. *Id.* at 627. Marshall stated that the proposition was so obvious that "it can require no argument." *Id.*

son exercising the same powers would be.¹⁹⁵

With this opinion, Marshall, at the expense of ignoring his earlier opinion in *Head & Amory*, secured the place of the American business corporation.¹⁹⁶ Story, however, wanted more and therefore went on to expound a general theory of private and public corporations that would open the opinion to the broadest possible interpretation and significance for the development of the corporate business form in the United States.¹⁹⁷ Finally, and most importantly, Story's opinion was presented as established law by James Kent in his *Commentaries on American Law*,¹⁹⁸ and taken as a starting point by Joseph Angell and Samuel Ames in their *Treatise on the Law of Private Corporations Aggregate*,¹⁹⁹ which Newmyer identified as "the standard work on corporate law for this period."²⁰⁰

III. AMERICAN CORPORATE LAW AS OF 1832

In 1832, Joseph K. Angell and Samuel Ames finally published the first American treatise on the law of private corporations in the United States.²⁰¹ The Angell and Ames treatise was to proceed through eleven editions from 1832 to 1882 and was the leading American treatise on corporation law before the publication of William W. Cook's treatise in 1887.²⁰² The authors in their Preface describe the need for the work:

195. *Id.* at 636.

196. Newmyer, *supra* note 162, at 826-27.

197. According to Newmyer, while Story's concurrence was in fact unnecessary since he completely agreed with Marshall, the concurrence expanded upon Marshall, thereby making clear that the opinion applied not only to eleemosynary educational institutions such as Dartmouth College, but to all business corporations. *Id.* at 835-38. For this reason, the opinion was the key in furthering the use and development of the corporate business form in the United States. *Id.* Further, Story put state legislatures and the business corporation on the same level of individual legal authority, thereby making no distinction between mercantilism and free enterprise. *Id.* at 841. In other words, the corporation was not an implement of state economic policy, but rather a free actor with contract rights equivalent to that possessed by the state legislatures themselves. *Id.* Overall, this signaled the move from European theories of mercantilism to free enterprise (*laissez-faire*) theories in the United States during the early period of the republic. *Id.* For a general discussion of the relation between mercantilism and *laissez-faire* in the early republic, Newmyer cites Robert A. Lively, *The American System: A Review Article*, 29 *BUS. HIST. REV.* 81 (1955). *Id.* at 841 n.60.

198. KENT, *COMMENTARIES ON AMERICAN LAW* 276 (12th ed. O.W. Holmes, Jr. 1873). Newmyer identifies Kent's *COMMENTARIES* as "the most influential treatise on American law to appear in the nineteenth century." Newmyer, *supra* note 162, at 838.

199. ANGELL & AMES, *supra* note 5.

200. Newmyer, *supra* note 162, at 838. See William P. Wells, *The Dartmouth College Case and Private Corporations*, 9 *A.B.A. REP.* 229-50 (1886), for a summary of nineteenth century cases on the subject of *Dartmouth College*.

201. JOSEPH K. ANGELL & SAMUEL AMES, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE* (1st ed. 1832, 2d ed. 1843, 3d ed. 1846, 4th ed. 1852, 5th ed. 1855, 6th ed. 1858, 7th ed. 1861, 8th ed. 1866, 9th ed. 1871, 10th ed. 1875, 11th ed. 1882). All citations are to the first edition of 1832.

202. WILLIAM W. COOK, *A TREATISE ON THE LAW OF STOCK AND STOCKHOLDERS* (1st ed. 1887), subsequently published as *A TREATISE ON STOCK AND STOCKHOLDERS AND GENERAL CORPORATION LAW* (2d ed. 1889); *A TREATISE ON STOCK AND STOCKHOLDERS, BONDS, MORTGAGES, AND GENERAL CORPORATION LAW* (3d ed. 1894); and *A TREATISE*

The reader does not need to be told, that we have in our country an almost infinite number of corporations aggregate, which have no concern whatever . . . with affairs of a municipal nature. These associations we not only find scattered throughout every cultivated part of the United States, but so engaged are they in all the varieties of useful pursuit, that we see them directing the concentration of mind and capital to the advancement of religion and morals; to the diffusion of literature, science, and the arts; to the prosecution of plans of internal communication and improvement; and to the encouragement and extension of the great interests of commerce, agriculture, and manufactures.²⁰³

A. CORPORATIONS IN THE UNITED STATES

Angell and Ames discussed the differences between the English practice of corporations and of that in the United States: “[w]hat is done in England by combination, unless it be the management of municipal concerns, is most generally done by a combination of individuals, established by mere articles of agreement.”²⁰⁴ In the United States, most such undertakings were instead undertaken through an express act or charter of incorporation.²⁰⁵ Given this situation, Angell and Ames stated that “[w]hile we therefore perceive the reason why so little attention has been devoted by English authors to the law of private corporations, we cannot but be impressed with a deep sense of the importance of this law in our own country.”²⁰⁶ They identified (incorrectly) Kyd’s work of 1753 as the first English work devoted exclusively to corporation law,²⁰⁷ but felt it was only useful as a general reference in the United States since despite the author’s attempt to treat corporations generally, in reality his work only covers municipal corporations.²⁰⁸ Kyd was further criticized for two prin-

ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK (4th ed. 1898, 5th ed. 1903, 6th ed. 1908, 7th ed. 1913, 8th ed. 1923). According to Cook’s obituary notice, his treatise “became at once the standard work on corporation law” when first published in 1887. Henry Winthrop Hardon, *Memorial of William Wilson Cook*, in N.Y. City B. Assn. Y.B. 365, 366 (1931). Cook’s treatise is beyond the scope of this essay, but for an excellent overview of his contributions, see Alfred Conard, *Cook and the Corporate Shareholder: A Belated Review of William W. Cook’s Publications on Corporations*, 93 MICH. L. REV. 1724 (1995).

203. ANGELL & AMES, *supra* note 5, at v.

204. *Id.* at v.

205. *Id.* at v-vi.

206. *Id.* at vi.

207. *Id.* But see SHEPPARD, section I, *supra* Part I.A.2.

208. ANGELL & AMES, *supra* note 5, at vi-vii. Interestingly, the authors rely quite heavily on Kyd throughout their treatise. Conard criticizes both Kyd and Angell & Ames for their failure to treat joint stock companies, their attributes, and potential abuses adequately. See CONRARD, *supra* note 22, at 1726-28. Conard, however, fails to note that the corporation at the time of Angell’s & Ames’s first edition was still only in its early stages of development in the United States. He therefore misses the significance of this earliest American work in influencing the continued development of the corporate form in the United States. After all, the position of the business corporation in the United States was still not entirely secure even after the *Dartmouth College* decision, and part of the significance of Angell & Ames’ work was securing the continuity of the corporate form in the United States.

cial reasons: (1) corporation law at the time he wrote “had not attained its present perfection in England;” and (2) because important changes in such law had since been made in the United States.²⁰⁹ With these criticisms, Angell and Ames went on to rely heavily on Kyd’s formulations in their treatise on corporate law in the United States.

In their introduction, Angell and Ames defined a corporation: “A corporation, as it is generally understood, is an intellectual body, created by law, composed of individuals united under a common name, so that the body continues the same, notwithstanding the change of the individuals who compose it, and which for certain purposes is considered a natural person.”²¹⁰ Taking this definition as their point of departure, Angell and Ames stated that earlier books often confused the terms “corporation” and “incorporation,” and a reading of the earlier works suggests that this was in fact the case.²¹¹ Further, Angell and Ames may have been the first authors to explicitly differentiate between the two terms. Accordingly, Angell and Ames defined “corporation” as the institution itself, while “incorporation” as the act of creating a corporation—thus clarifying the terms as they continue to be used.²¹²

Angell and Ames proceeded to expound on the characteristics of the corporation. First, they defined it as a political institution and therefore with “no other capacities than such as are necessary to effect the purpose of its creation.”²¹³ The *ultra vires* doctrine by this time, therefore, seems to have been established although Angell and Ames did not identify it as such. Second, the corporation was immortal; however, Angell and Ames stated that this does not mean that the corporation will continue forever, but rather it has the capacity to operate “in perpetual succession” as long as the corporate charter is in effect.²¹⁴ Angell and Ames criticized earlier authors for expressing the idea that a corporation was intangible, but, they affirmed that corporations cannot be executed or imprisoned.²¹⁵ Accepting the proposition that a corporation was composed of any number of persons, but that the corporation itself was a singular entity, Angell and Ames stated that the will of the corporation is determined by the majority—this clearly indicates the democratic foundations of the institution at that time.²¹⁶

Angell and Ames stated that a charter was required for any valid incorporation, and the public benefit that the corporation supplied was considered sufficient consideration for the execution of a binding and

209. ANGELL & AMES, *supra* note 5, at vii.

210. *Id.* at 1 (citing BROWNE, COMPENDIOUS VIEW OF THE CIVIL LAW 99 (1797)); LA-CIV. CODE ANN., tit. 10, ch. 1, art. 418 (1825)). Note the similarity to Coke’s much earlier definition of corporation. See Coke, *supra*, Part I.A.1.

211. ANGELL & AMES, *supra* note 5, at 3.

212. *Id.*

213. *Id.* at 4. Angell’s & Ames’s term “political” merely indicates that the corporation was a product of the state through legislative grant.

214. *Id.* at 4.

215. *Id.* at 5.

216. *Id.* at 6.

irrevocable contract.²¹⁷ The irrevocable nature of the corporate charter was the result of *Dartmouth College*, which also suggested that public benefit was in fact one source of consideration;²¹⁸ nonetheless, this statement in Angell and Ames is important because it placed an essentially American development in the context of the security of the corporate form itself. Angell and Ames were convinced that a public benefit was in fact required: "the design of a corporation is to provide for some good that is useful to the public."²¹⁹ The need for a public benefit, however, would seem to have been eroded by that point in time because of the large number of purely business charters that were being granted, as well as the evolution of general incorporation statutes in some states.

B. PRIVATE CORPORATION DEFINED

After distinguishing between the usual classes of corporations,²²⁰ Angell and Ames, in Chapter I, proceeded to detail the meaning, kinds, and history of private aggregate corporations. According to the authors, the private corporation was distinguishable from a municipal or public corporation in that private corporations possess a corporate fund for the satisfaction of judgments.²²¹ Further, due to the existence of this corporate fund, the members had limited liability.²²² With respect to municipal corporations, however, "each member . . . is liable in his person and private estate to the execution."²²³ While Angell and Ames did not cite any particular authority for the proposition of limited liability for the shareholders of a private aggregate corporation, they did quote Chief Justice Marshall's opinion in *United States Bank v. Planters' Bank of Georgia* that seems to imply that result: "The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, and not by that of the individual corporators."²²⁴ This statement seems to indicate that the "corporators" were in fact entitled to limited liability under the corporate form, even though *Planters' Bank* was a decision made in re-

217. "Persons who are disposed to make appropriations for any useful purpose, can never fully obtain their object without an incorporating act of the government; and accordingly it has been generally the policy and the custom (especially in the United States) to incorporate all associations, which tend to the public advantage, in relation to municipal government, commerce, literature, charity and religion. . . . The *public benefit* is deemed a sufficient consideration of a grant of corporate privileges; and hence, when a grant of such privileges is made (being in the nature of an executed contract), it cannot . . . be revoked." *Id.* at 7 (citing *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 581, 637 (1819)).

218. See *Dartmouth Coll.*, *supra* Part II.

219. ANGELL & AMES, *supra* note 5, at 7.

220. Public and private, sole and aggregate. See ANGELL & AMES, *supra* note 5, at 8-20. The authors add the remainder to the traditional types, i.e., ecclesiastical and lay, civil and eleemosynary. *Id.* at 24-25.

221. *Id.* at 23.

222. Limited liability exists "by the irresponsibility of the members for the corporate debts, beyond the amount of their interest in the fund. . ." *Id.*

223. *Id.*

224. 22 U.S. (9 Wheat.) 904 (1824).

gard to the limited liability of the United States for the debts of a corporation of which the state was a shareholder.

The existence of limited liability becomes even clearer when the authors compared the limited liability of a partnership to that of a corporation. According to Angell and Ames, a partnership was "a voluntary contract between two or more persons, for joining together their money, goods, labor, and skill, upon the mere articles of agreement, that the gain or loss shall be divided proportionably between them; and which is not confirmed by public authority."²²⁵ The partnership, then, did not have the political nature of a corporation through the grant of a state charter and did not possess limited liability because the partners were proportionally liable for all partnership debts, as proposed to a corporation, where liability is limited to the various shares owned in a corporation. That is, in every private unincorporated company, "the members are liable for the debts without limitation."²²⁶ In an incorporated company, the members "are only liable to the extent of their shares in the stock in trade of the society, and on contracts entered into or made in their corporate character."²²⁷ Given that limited liability was an attribute accorded by a state granted charter, limited liability must be seen as a significant reason for procuring the charter in the first place.²²⁸ Angell and Ames therefore saw limited liability as in fact a public benefit given to the corporation as an annex to the public benefit the corporation must provide in order to acquire a charter in the first place: "[t]he public, therefore, gain by acts incorporating trading associations, as by such means persons are induced to hazard a certain amount of property for the purposes of trade and public improvement, who would abstain from so doing, were not their liability thus limited."²²⁹

In concluding their first chapter, Angell and Ames quote Kent as to the incredible popularity of the corporate form at the time their treatise was written:

[T]he multiplication of corporations [in the United States], and the avidity with which they are sought, have arisen in consequence of the power which a large and consolidated capital gives them over business of every kind; and the facility which the incorporation gives to the management of that capital, and the security which it affords to the persons of the members, and to their property not vested in the

225. ANGELL & AMES, *supra* note 5, at 31.

226. *Id.*

227. *Id.*

228. *Id.* "It is frequently the object, in this and in other countries, in procuring an act of incorporation, to limit the risk of the partners to their shares in the stock of the association; and prudent men are always backward in taking stock when they become mere copartners as regards their personal liability for the company debt." *Id.* at 23. Note also the similarity of this section to Smith's earlier analysis. *Supra*, Part I.

229. ANGELL & AMES, *supra* note 5, at 24. This may be the closest term yet to the modern term "limited liability." Angell and Ames mention that to some extent limited partnerships have been used for this purpose as well. Such forms were allowed in France as early as 1673 and later appeared in New York and Pennsylvania as well but had not appeared by this time in England. *Id.* at 24.

corporate stock.²³⁰

While Angell and Ames did not discuss the potential problems of corporate abuses and shareholder rights, it is important to remember that these were not really problems yet in the United States. Further, while the previous British experiences with the South Sea Bubble in 1720 perhaps should have indicated the need for treatment of such problems, men including businessmen and lawyers (perhaps especially businessmen and lawyers) have always had short memories, as has been evidenced over and over throughout history.

C. CREATION OF PRIVATE CORPORATIONS

The authors next turned to the issue of creation of private corporations. Under civil law at this time, incorporation required the approbation of the sovereign along with an explication of the usefulness and public benefit of the intended corporation.²³¹ Corporations historically had been created without such direct assent and had been allowed to continue to exist through the implied assent of the sovereign.²³² In England, consent was given either through a charter or an act of parliament, while assent was implied through the common law or by prescription.²³³ While a few early corporations in the United States existed by way of common law or prescription as in England, in general corporations were created through the state legislatures.²³⁴ Such state grants clearly were seen as not in conflict with any law of Congress or the Constitution of the United States.²³⁵

As Coke stated, “[n]o precise form of words is necessary in the creation of a corporation.”²³⁶ A grant, however, does require acceptance in order for a corporation to be in fact created.²³⁷ Once accepted, though, “[a] grant of incorporation is in fact in the nature of a contract between the government and its subjects, the latter of whom undertake, in consideration of the privileges bestowed, to do what the government is interested in having done.”²³⁸ In other words, as previously stated, the public benefit provides the necessary consideration to form a valid contract.²³⁹

230. 2 KENT, *supra* note 193, at 272.

231. ANGELL & AMES, *supra* note 5, at 37.

232. *Id.* at 37-38.

233. *Id.* at 38-40. Note once again the strong similarity to Coke’s formulation in *Sutton’s Hospital*, *supra*, Part I.A.1.

234. “The state legislatures, in the United States, have for many years past, and in very numerous instances, exercised the right of granting corporate privileges both to public and to private companies.” ANGELL & AMES, *supra* note 5, at 41.

235. “The competency of the legislative power of a State to create corporations, with powers which are not repugnant to the constitution of the United States and the acts of Congress, and which do not conflict with the powers of the general government, “is so clear, so generally admitted, and has been so long and so often claimed and exercised, that it is unnecessary to offer any arguments or authorities to establish it.” *Id.* at 41; *see also*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (the federal government, as well as the states, has the power to create corporations).

236. ANGELL & AMES, *supra* note 5, at 45.

237. *Id.* at 46-47.

238. *Id.* at 47.

239. *See supra*, Part II *Dartmouth Coll.*

D. COMPOSITION OF THE CORPORATION

Next, the authors addressed composition of the corporation. First, a corporation is composed of persons, either natural or as members of other corporations.²⁴⁰ Second, as related by Coke, every corporation must have a name, in order for it "to sue and be sued, and do all legal acts."²⁴¹ Third, a "corporation should be constituted of some place."²⁴² Given these attributes and a valid incorporation, a corporation automatically had several incidents, and therefore they did not need to be stated in the charter.²⁴³ The authors restated Kyd for the five necessary incidents and the three essential capacities.²⁴⁴ Accepting these as a point of beginning, the authors stated that these powers and incidents could be and often were, limited by the charter.²⁴⁵ Further, "[t]he general practice in the United States is, to specify the powers with which it is intended to endow the society or company incorporated; and these powers will be found to be given in reference to the object . . . of creating the corporation."²⁴⁶ While this situation is not completely identical to the incidents of the doctrine of *ultra vires*, it would seem a necessary predecessor.

Overall, then, despite their criticisms of Kyd, Angell and Ames relied very heavily on his treatise. Further, most of their treatise only builds slightly on what had been developed previously, dating back to Coke in *Sutton's Hospital Case*. Interestingly, though, they treated limited liability as a corporate incident, similar to the treatment accorded by Smith, without any strong authority for their proposition. On that basis, it may be argued that the strength of limited liability in the United States, may in fact date to the first edition in 1832 of Angell and Ames, *Treatise on the Law of Private Corporations Aggregate*.

IV. CONCLUSION

By 1832, the American business corporation had achieved the essential form that it would possess for approximately the next fifty years. Given this status, history indicates that American corporate law owes much to the early English law on the subject. More importantly, however, corporate development in the United States appears to have been based on purely American developments in the period after the Revolution and especially after the institution of the United States Constitution in 1789. Landmark opinions such as that of Justice Story in the *Dartmouth College* case further strengthened the legal foundations of the American business corporation. Finally, in 1832 with the publication of the Angell and Ames treatise, the authors themselves probably influenced the later develop-

240. ANGELL & AMES, *supra* note 5, at 51.

241. *Id.* at 54.

242. *Id.* at 57.

243. *Id.* at 58.

244. *Id.* at 58-59 (citing 1 Kyd at 69-70).

245. ANGELL & AMES, *supra* note 5, at 59.

246. *Id.*

ment of the law of business corporations in the United States, at least through the majority of the subsequent fifty years, as much as any other single factor, especially in the area of limited liability. To return to our starting point, the development of the law of private corporations in the United States was not planned, immediate or even uncontroversial, but rather (in the tradition of the common law) a gradual building up of the various supports necessary for the commercial and financial effectiveness of the form. For those today seeking to advance the corporate (and thereby economic) development in individual economies, the lesson to draw should be to focus on the economic goals, needs and issues (e.g., corporate governance) and seek to put in place the legal structures necessary to meet those needs and goals, while minimizing inherent difficulties.

